90-773

No. _____

In The

Supreme Court of the United States

October Term, 1990

SOUTH RIDGE BAPTIST CHURCH,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF OHIO, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(1.) Whether, after recent Supreme Court precedent, the Establishment Clause of the First Amendment is violated by the application to a church of a State Workers' Compensation Act which expands the degree of involvement between state and church to create an ongoing relationship of state control, administration, supervision, evaluation and surveillance and creates a ready confrontational situation between church and state.

(2.) Whether the standards enunciated in this Court's *Employment Division v. Smith* decision apply to a church (as opposed to an individual) that is being compelled to submit to the dictates of a State Workers' Compensation Act when the Act inescapably mandates conduct that the church finds objectionable for religious reasons, given the fact that the church's conduct is manifestly noncriminal in nature.

[Note: Petitioner reserves the right to argue Question Three in the event certiorari is granted on both of the above questions, but does not include Question Three among the reasons for granting certiorari].

(3.) Whether the courts below should have required the state to prove a compelling state interest and to prove that the Act was the least restrictive means of accomplishing that interest, instead of compressing the "means" analysis into the "interest" prong of the traditional test.

PARTIES TO THE PROCEEDING ON REVIEW

The Plaintiff-Petitioner to the proceedings in which judgment is sought to be reviewed were:

> South Ridge Baptist Church of Conneaut, Ohio, an independent Baptist Church organized as an Ohio not-for-profit religious corporation.[1]

The Defendants-Respondents to the proceedings were:

(1) The Industrial Commission of Ohio

(2) The Ohio Bureau of Workers' Compensation

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[1] Pursuant to Rule 29.1, Plaintiff-Petitioner, South Ridge Baptist Church, states that it has no parent companies or subsidiaries.

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The petitioner, South Ridge Baptist Church, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on August 17, 1990, in the above-entitled proceeding.

OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 911 F.2d 1203 (6th Cir. 1990) and is reprinted in the Appendix hereto beginning at p. 20a. The memorandum opinion and order of the United States District Court for the Southern District of Ohio (Graham, J.) is reported at 676 F.Supp. 799 (S.D. Ohio 1987) and is reprinted in the Appendix hereto, beginning at p. 1a.

JURISDICTION OF THE COURT

This petition for Writ of Certiorari stems from the judgment of the United States Court of Appeals for the Sixth Circuit, filed on August 17, 1990, *South Ridge Baptist Church v. Industrial Commission*, 911 F.2d 1203 (6th Cir. 1990).

Supreme Court jurisdiction to review this decision is conferred under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, First Amendment:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Fourteenth Amendment, Section One:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Const. art. II, § 35, p. 45a, *infra*.

Ohio Rev. Code Ann. §§ 4123.01, 4123.12, 4123.19, 4123.23, 4123.24, 4123.26, 4123.28, 4123.29, 4123.30, 4123.35, 4123.76, 4123.78, 4141.09, p. 47a *et seq.*, *infra*.

STATEMENT OF THE CASE

The South Ridge Baptist Church of Conneaut, Ohio, filed a complaint pursuant to 42 U.S.C. § 1983 against Defendants the Industrial Commission of Ohio and the Ohio Bureau of Workers' Compensation. Plaintiff-Petitioner sought a declaration that the provisions of the

Ohio Workers' Compensation Act, Ohio Rev. Code Ann. § 4123.01 *et seq.*, are unconstitutional as applied to it and an injunction against the Defendants from enforcing the workers' compensation laws against Plaintiff-Petitioner. The complaint was filed in the United States District Court for the Northern District of Ohio. Venue was found to be proper in the United States District Court for the Southern District of Ohio, and the case was transferred there. Defendants filed a motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief may be granted. Pursuant to Federal Rule of Civil Procedure 12(c), the district court converted the motion to dismiss into a motion for summary judgment. The court subsequently issued its Memorandum and Order granting judgment to Defendants against Plaintiff-Petitioner. Plaintiff-Petitioner's complaint was dismissed. A copy of this memorandum and order is reprinted herein beginning at p. 1a, *infra*.

Plaintiff-Petitioner appealed this decision to the United States Court of Appeals for the Sixth Circuit. On appeal, the Sixth Circuit utilized the long-standing analysis set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and its progeny to decide Petitioner's Free Exercise claim. The Circuit Court held that the State of Ohio need not demonstrate that its scheme to include churches in the Workers' Compensation Act was the least restrictive means of advancing the state's compelling interest.

With regard to Plaintiff-Petitioner's Establishment Clause claim, the Circuit Court ruled that because the Workers' Compensation Act was a neutral tax law, there was no prohibited entanglement between church and

state. The opinion of the United States Court of Appeals for the Sixth Circuit is published at 911 F.2d 1203 (6th Cir. 1990) and is reprinted herein beginning at p. 20a, *infra*. The church now petitions this Court for a writ of certiorari to review these analyses in light of the most recent Supreme Court decisions which significantly impact this area.

REASONS FOR GRANTING THE WRIT

The Decision Below That The Establishment Clause Does Not Prevent The State From Entangling A Church In A State Workers' Compensation Program Raises Important And Unresolved Issues.

The Sixth Circuit has here held that the application of the Ohio Workers' Compensation Act to a church does not violate the Establishment Clause of the First Amendment. In so holding, the lower court relied upon the recent decisions of *Jimmy Swaggart Ministries v. Board of Equalization*, ___ U.S. ___, 107 L. Ed. 2d 796 (1990) (imposition of a sales and use tax upon an individual's ministry does not violate the Establishment Clause) and *Hernandez v. C.I.R.*, ___ U.S. ___, 104 L. Ed. 2d 766 (1989) (disallowance of a charitable deduction under 26 U.S.C. § 170 to an individual taxpayer does not violate the Establishment Clause). However, there is no decision by this Court holding that the application of a State Workers' Compensation Act to a church as opposed to an individual or an individual's ministry, does not violate the Establishment Clause. As the Court stated in *Walz v. Tax Comm'n*, 397 U.S. 664, 674-675 (1970), "Elimination of exemption [that is, imposing the tax on the church] would tend to expand

the involvement of government [in church affairs]. . . . Granting tax exemptions to churches . . . gives rise to some, *but yet a lesser, involvement than taxing them.*" (emphasis added.)

The Court has spoken with regard to the commercial activities of a non-profit foundation. *See Alamo Foundation v. Secretary of Labor,* 471 U.S. 290 (1985). The Court has addressed the issue of property tax. *See, Walz, supra,* 397 U.S. at 664. The Court has ruled with regard to zoning laws. *See Larkin v. Grendel's Den, Inc.,* 459 U.S. 116 (1982); however, the Court has never analyzed Workers' Compensation laws as applied to a church.

The lack of such a ruling by the Supreme Court has had and will continue to have pervasive and wide-ranging effects upon the delicate balance between church and state. The inclusion of churches in the Workers' Compensation Act has already led to and has the potential to escalate divisive political situations. As this Court stated in *Lemon v. Kurtzman,* 403 U.S. 602, 623 (1971):

> It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.

In this case, there have already been situations whereby the political system has been the subject of conflict over the barrier between church and state. At least two pieces of legislation proposing to exempt churches from the Workers' Compensation Act have been proposed, debated and voted down. As this Court noted:

"[I]ndividual churches frequently take strong positions on public issues including . . . vigorous advocacy of . . . positions." *Walz*, 397 U.S. at 670. There is nothing to suggest that the status of churches in this case will not continue to be an issue that will cause the type of political fragmentation and divisiveness along religious lines that the *Lemon* Court so abhorred. The situation will only be exacerbated by the fact the the Ohio Workers' Compensation fund is in serious financial difficulty. *See* Affidvit of Paul C. Whitacre, Jr., p. 2-5. There is great potential therefore, for higher premiums to be demanded from churches, thus adding more fuel to the political fire and creating an even greater entanglement between church and state.

If the Sixth Circuit's decision is allowed to stand unchallenged, the church is then opened up to state categorization of church staff members according to risk, state liens on church real estate and personalty, state forfeitures and state attachment proceedings. *See* Ohio Rev. Code. Ann. §§ 4123.12, 4123.19, 4123.23, 4123.26, 4123.76, 4123.78. These possibilities embody the "direct confrontations and conflicts" between church and state that were discussed and rejected as unconstitutional in *Walz*, 397 U.S. at 674. Additionally, the possibility of unconstitutional entanglement is increased by the fact that the Workers' Compensation Act would apply in this situation to the church itself, and not to an individual member or believer. "[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." *Aguilar v. Felton*,

473 U.S. 402, 410 (1985) *quoting McCollum v. Board of Education*, 333 U.S. 203, 212 (1947).

In addition, the decision by the United States Court of Appeals for the First Circuit in *Surinach v. Pesquera de Busquets*, 604 F.2d 73 (1st Cir. 1979) conflicts in principle with the decision of the Sixth Circuit in the case at bar. In *Surinach*, the Court held that the actions taken by the Secretary of Consumer Affairs of Puerto Rico in investigating the operating costs and budgets of parochial schools violated the Establishment Clause of the First Amendment. Under the rationale in *Surinach*, it seems clear that if the First Circuit was faced with the situation at bar, it would have decided the issue adversely to the Sixth Circuit.

Lower courts need guidance from this Court as to the constitutionality of a state workers' compensation act to a church in light of the principles set forth in the Establishment Clause of the First Amendment.

Religious Claimants And State And Federal Courts Need Guidance On The Application Of The Traditional *Sherbert* Test After The Recent *Smith* Decision.

The opinion of the United States Court of Appeals for the Sixth Circuit was decided and filed on August 17, 1990. This Court's decision in *Employment Division v. Smith*, ___ U.S. ___, 108 L. Ed. 2d 876 (1990) was decided on April 17, 1990. The Circuit Court majority opinion in this case relied upon the traditional analysis of a Free Exercise Clause claim, and did not mention nor make use of the principles enunciated in *Smith*. Thus is raised a significant question whether the standards set forth in

Smith apply to a church that is compelled to submit to state laws and mandates which significantly burden its religious beliefs.

The Sixth Circuit relied upon the long-standing precedent set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *United States v. Lee*, 455 U.S. 252 (1982) to conclude that the Ohio Workers' Compensation Act's application to the church did not violate the church's right to the free exercise of religion under the First Amendment. The Appellate Court held that the "least restrictive means" prong of the test was subsumed within the compelling state interest prong, if the state's interest is sufficiently compelling. *See South Ridge Baptist Church v. Industrial Commission*, 911 F.2d 1203, 1208-09 (6th Cir. 1990). If this Court does not address the question as to which set of standards should be applied, lower courts and litigants are left with absolutely no guidance as to the correct analysis to use when addressing this issue.

Further, there is no decision by this Court enunciating which set of principles to utilize when the religious claimant is a church, as opposed to an individual. As *Bowen v. Roy*, 476 U.S. 693, 703 (1986) states: "The [statute] . . . is wholly neutral . . . [i]t does not intrude on the organization of a religious institution or school."

By contrast, in this case, the Ohio Workers' Compensation Act directly interferes with the church and its ministry. By implication, the *Bowen* court seemed to suggest that a different standard would be used in such a case.

The Court has ruled with regard to unemployment compensation. *See e.g. Sherbert* 374 U.S. at 398, and *Smith*,

___ U.S. at ___, 108 L. Ed. 2d at 876. The Court has ruled with regard to Social Security. *See Lee*, 455 U.S. at 252. The Court has ruled with regard to Aid to Families with Dependent Children. *See Bowen*, 476 U.S. at 693. However, the Court has been silent with respect to the issues at bar.

Unlike the majority of the other cases that the Court has decided, the church here is not seeking to obtain a benefit from the state. *See e.g., Smith*, ___ U.S. at ___, 108 L. Ed. 2d at 876; *Lee*, 455 U.S. at 252; *Bowen*, 476 U.S. at 693. Instead, the church is seeking to escape the mandates of a state Act which requires the church to engage in conduct that impermissibly burdens its religious beliefs. The church is not using the First Amendment to get anything from the state, but instead is invoking the Free Exercise Clause's protections to guard against potential constitutional violations. As the Court held: "The general principle deducible from the First Amendment . . . is this: that we will not tolerate . . . governmental interference with religion." *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970).

A further question that is raised by the *Smith* decision is whether *Smith* is applicable to a situation where the religious claimant is not using the Free Exercise Clause as means to transgress a state penal law. As the Court said, "[W]e would not apply [the *Sherbert* analysis] to require exemptions from a generally applicable criminal law." *Smith*, ___ U.S. at ___, 108 L. Ed. 2d at 889. In this case, there is no criminal law at issue; the Ohio Workers' Compensation Act is civil in nature. The lower courts are without direction as to the scope of *Smith* as applied in a situation such as this.

With the Court's articulation of the *Smith* analysis, and seeming curtailment of the *Sherbert* standard, further clarification of the parameters of *Smith* needs to be set forth. This case offers an opportunity for that clarification due to the fact the Sixth Circuit chose not to apply *Smith's* rationale, but instead utilized the traditional *Sherbert* test.

If the Court holds that the dictates enunciated in *Smith* apply to this case, there is a strong argument that the issues in this case fall within a "hybrid" situation still protected by the Free Exercise clause of the First Amendment as made applicable to the states by the Fourteenth Amendment. *See Smith*, ___ U.S. at ___, 108 L. Ed. 2d at 887-88. That hybrid area is "the Free Exercise Clause in conjunction with other constitutional protections," in this case, an Establishment Clause claim. In such a situation, "[T]he First Amendment bars application of a neutral, generally applicable law to religiously motivated action . . . " *Smith*, ___ U.S. at ___, 108 L. Ed. 2d at 887.

If the Court for any reason should hold that the *Sherbert* analysis should be applied to this case, there is an argument that the Sixth Circuit improperly circumscribed the "least restrictive means" prong of *Sherbert*. Unlike the Federal Social Security Act, the Ohio Workers' Compensation Act is "essentially a financing system for contractual arrangements between worker and employer." *South Ridge Baptist Church v. Industrial Comm'n*, 911 F.2d 1203, 1212-13 (6th Cir. 1990) (Boggs, J. concurring). Instituting a system whereby churches are not included in the Act would not wreak havoc with the Workers' Compensation system as it potentially would with the Social Security Act. Additionally, through its provisions for attachments, fines and liens, the Ohio

Workers' Compensation Act is certainly the type of constitutionally invalid statute which "affirmatively compel(s) [the church] by threat of sanctions to refrain from religiously motivated conduct. . . . " *Bowen v. Roy*, 476 U.S. 693, 703 (1986).

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question Three is presented herein, not as a reason for granting certiorari, but because in the posture of this case this is the only opportunity for petitioner to seek review of the ruling of the Sixth Circuit. If the petitioner is correct in urging that the Sixth Circuit did not correctly analyze the issues presented, the matter should be remanded to the District Court for appropriate disposition, after a full development of the facts concerning the issues in this case.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

South Ridge Baptist Church,

Plaintiff,

vs.

Industrial Commission of Ohio, et al.,

Defendants.

Case No.
C2-86-875
JUDGE GRAHAM

MEMORANDUM AND ORDER

Plaintiff, South Ridge Baptist Church of Conneaut, Ohio, has filed the present action under 42 U.S.C. §1983 against the Industrial Commission of Ohio and the Ohio Bureau of Workers' Compensation. Plaintiff is a non-profit religious organization. Defendants are agencies of the State of Ohio which administer the statutory workers' compensation program. Plaintiff seeks declaratory relief in the form of a judgment declaring that the Ohio workers' compensation statutes and regulations are unconstitutional as applied to plaintiff. In addition, plaintiff requests that defendants be enjoined from enforcing the workers' compensation laws against plaintiff.

Plaintiff alleges in its complaint that it possesses a sincerely-held religiously based objection to participating in or contributing to the Ohio Workers' Compensation System. Plaintiff contends that the statutory scheme constitutes a threat to plaintiff's right to free exercise of religion in violation of the First Amendment of the United States Constitution. Plaintiff's next claim is that the state program presents an impermissible risk of

excessive government entanglement in the affairs of the church and interferes with church management prerogatives concerning the use of money and effort. Plaintiff further claims that the Ohio General Assembly in passing the workers' compensation laws did not intend to include religious organizations such as plaintiff within the scope of those laws, and that to include plaintiff within the coverage of those laws would violate the Ohio Constitution.

The present case was originally filed on May 27, 1983 in the United States District Court for the Northern District of Ohio. Venue was found to be proper in the Southern District of Ohio, and the case was transferred to this court on July 11, 1986. Defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted on July 31, 1987. In light of the affidavits filed with the record, the court on October 1, 1987 elected to treat defendants' motion to dismiss as a motion for summary judgment under Fed. R. Civ. P. 56, and allowed the parties the opportunity to present additional argument and evidence.

Defendants' motion to dismiss includes three branches. Defendants first argue that plaintiff's suit is barred by the principles of *res judicata* and collateral estoppel in light of the decision of the Lorain County Court of Appeals in *Victory Baptist Temple v. Industrial Commission of Ohio*, 2 Ohio App.3d 418, 442 N.E.2d 819 (1982). In that case, the plaintiff church sought exemption from the payment of workers' compensation premiums on First Amendment religious grounds. The Court of Appeals held that the Ohio workers' compensation laws

as applied to plaintiff did not violate the First Amendment.

In actions under 42 U.S.C. §1983, the preclusive effect of a prior state court judgment is to be determined by reference to the law of the state where the judgment was rendered. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984); *Allen v. McCurry*, 449 U.S. 90 (1980).

Under Ohio law, a final judgment on the merits is conclusive of rights, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties or those in privity with them. *Norwood v. McDonald*, 142 Ohio St. 299, 52 N.E.2d 67 (1943). Before *res judicata* can be applied, the parties to the subsequent action must be identical to those of the former action or be in privity with them. *Cole v. Ottawa Home and Savings Ass'n*, 18 Ohio St.2d 1, 246 N.E.2d 542 (1969). One is deemed to be in privity if he succeeds to the estate or interest of another. *Whitehead v. General Telephone Co.*, 20 Ohio St.2d 108, 254 N.E.2d 10 (1969). Privity is a succession of interest or relationship to the same thing. *City of Columbus v. Union Cemetery Ass'n*, 45 Ohio St.2d 47, 341 N.E.2d 298 (1976).

The court finds no indication in the record that plaintiff was involved in any way in the *Victory Baptist Temple* litigation, or that it is otherwise in privity with Victory Baptist. The mere fact that identical or similar issues are raised by plaintiff is not sufficient to make plaintiff a privy to Victory Baptist. Therefore, the principles of *res judicata* and collateral estoppel do not present a bar to plaintiff's cause of action.

Defendants also urge this court to abstain from exercising jurisdiction in this case. Abstention from the exercise of federal jurisdiction is the exception, not the rule. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). As the Supreme Court stated, *Id.*:

> The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.

It was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it. *Id.* at 813-814. The Supreme Court in *Colorado River Water Conservation District* listed three circumstances in which the doctrine of abstention would be appropriately invoked: 1) where a federal constitutional question might be mooted or presented in a different posture by a state court determination of state law; 2) when the case presents a difficult question of state law bearing on policy problems of substantial public import, and the exercise of federal jurisdiction would disrupt state efforts to establish a coherent policy with respect to those problems; and 3) where an injunction is sought to restrain the collection of taxes or criminal proceedings, and where no bad faith, harassment, or a patently invalid statute is involved.

None of these factors is present in this case. One state court has already addressed the issue now before this court, and has interpreted relevant state statutes. Extensive interpretation of the state regulatory provisions is not required here; rather, the question presented is primarily whether the state program violates plaintiff's rights under the United States Constitution. The court concludes that abstention is not required in this case.

Defendants' remaining argument addresses the merits of plaintiff's complaint. The court has converted defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) into a motion for summary judgment under Fed. R. Civ. P. 56.

The procedure for granting summary judgment is found in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The evidence must be viewed in a light favorable to the plaintiff. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970). Summary judgment will not lie if the dispute about a material fact is genuine, "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755, 4757 (June 25, 1986). However, summary judgment is appropriate if the opposing party fails to make a showing sufficient to establish the existence of an

element essential to that party's case and on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 54 U.S.L.W. 4775, 4777 (June 25, 1986).

The workers' compensation system is authorized by Article II, Section 35 of the Ohio Constitution. Section 35 authorizes the legislature to enact laws establishing a state fund maintained by compulsory employer contributions for the purpose of providing compensation to workers and their dependents for death, injury or occupational disease stemming from the workmen's employment.

Definitions of "employee" and "employer" are found in Section 4123.01, Ohio Revised Code. The definition of "employee" includes: "Every person in the service of any person, firm, or private corporation, including any public service corporation." On August 22, 1986, the statute was amended to exclude from the definition of employee "A duly ordained, commissioned, or licensed minister or assistant or associate minister of a church in the exercise of his ministry." Section 4123.01(A)(2)(a), Ohio Revised Code. Under Section 4123.01(A)(2), it is now within the discretion of the employer whether to elect workers' compensation coverage for ministers or assistant ministers.

Section 4123.01(B), Ohio Revised Code, defines "employer" as:

> Every person, firm, and private corporation, including any public service corporation, that (a) has in service one or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, . . .

Churches are included within the definition of "employer." *Victory Baptist Temple v. Industrial Commission of Ohio, supra.* The legislative intent to include churches and religious organizations within the definition of "employer" has been further clarified by the fact that while the legislature recently amended the definition of "employee" to exclude ministers, one particular type of church employee, it did not amend Section 4123.01(B) to exclude churches from the definition of "employer." Indeed, two bills recently introduced in the legislature in an effort to obtain an exemption for churches met with no success. The court concludes that plaintiff is an employer subject to the provisions of Chapter 4123, under which participation in the workers' compensation system is discretionary in regard to ministers or assistant ministers in the exercise of their ministries, but mandatory in regard to other employees.

Rates for premiums to be paid by employers are established by the Ohio Industrial Commission based upon the degree of hazard in each occupation and the total payroll for each class. Section 4123.19, Ohio Revised Code. Employers are required to maintain payroll records reflecting wage expenditures, and those records are subject to inspection by the Industrial Commission. Sections 4123.23 and 4123.24, Ohio Revised Code. An employer must also furnish an annual statement which includes the number of employees engaged in particular types of employment and the aggregate amount of wages paid. Section 4123.26, Ohio Revised Code. Under that section, failure to furnish such a statement renders the employer liable for a five hundred dollar forfeiture. In the event of a default in premium payments, the commission may

make an assessment against the employer under Section 4123.37, Ohio Revised Code. Failure to comply with an order or subpoena of the commission may result in the initiation of attachment proceedings. Section 4123.12, Ohio Revised Code. However, the affidavit of John R. Linzimmeir, Assistant Director of the Auditing/Underwriting Section of the Bureau of Workers' Compensation, indicates that legal action is initiated against a noncomplying employer only when informal attempts to encourage compliance have failed.

Every employee who is injured or who contracts an occupational illness, or who dies as a result of injury or occupational illness, is entitled to benefits unless the injury or illness was self-inflicted or caused by the employee's intoxication as the result of drug or alcohol use. Section 4123.54, Ohio Revised Code. Finally, under Section 4123.35, Ohio Revised Code, an employer, with the approval of the commission, may elect to become self-insured and pay benefits directly to its employees.

Plaintiff claims that the workers' compensation statutes constitute an unconstitutional burden on its free exercise of religion under the First Amendment of the United States Constitution. A challenge to a state regulation under the Free Exercise Clause necessitates a determination of whether the regulation infringes upon the free exercise of religion, and if so, whether the burden on free exercise is sufficiently justified by a compelling state interest. *Sherbert v. Verner,* 374 U.S. 398 (1963); *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

The mere fact that a religious practice is burdened by a governmental program does not mean that an exemption accommodating the practice must be granted. *Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707 (1981). Not all burdens on religion are unconstitutional, and the state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest. *United States v. Lee*, 455 U.S. 252 (1982).

Plaintiff's complaint alleges that plaintiff possesses a sincerely-held religiously based objection to participating in and contributing to the workers' compensation system. Plaintiff alleges that the system presents a threat to its free exercise rights. Plaintiff submitted various affidavits, including an affidavit in support of its motion for a preliminary injunction filed August 17, 1983, in which its pastor, Dr. Roger P. Hogle, voiced plaintiff's objections. Dr. Hogle stated that the plaintiff church objects that the state, through the workers' compensation system, assumes lordship over the church in direct contravention to the Biblical principle that Jesus is "head over all things to the church" (Eph. 1:22) and "that in all things he might have preeminence." (Col. 1:18) The plaintiff believes that it would be a sin to contribute to workers' compensation out of church funds designated for Biblical purposes and that tithe and offering money does not belong to the people or the pastor but to God. (Matt. 22:21) Plaintiff further believes that it has a scriptural duty to assist its people with food, clothing, shelter or other essentials needed due to accident or illness. (Romans 12:13) Defendants do not contest in any way the sincerity or substance of plaintiff's religious beliefs.

The Supreme Court found in a similar situation dealing with the social security tax that the governmental regulations impinged upon the religious beliefs of members of the Amish sect. See *United States v. Lee, supra.* Plaintiff's complaint is sufficient to allege infringement of its religious beliefs. Therefore, it must be determined whether the workers' compensation system represents a compelling state interest sufficient to override plaintiff's interest in free exercise of its religion. Plaintiff concedes that the state is advancing a compelling state interest through its workers' compensation system, but contends that by failing to exempt churches from coverage, the state has not adopted the least restrictive means of furthering that interest.

Contributions to the workers' compensation fund are analogous to the mandatory social security payments upheld in *United States v. Lee, supra.* See also *Varga v. United States,* 467 F.Supp. 1113 (D. Md. 1979); *Bethel Baptist Church v. United States,* 629 F.Supp. 1073 (M.D. Pa. 1986). The activities and practices of individuals, although religiously motivated, are often subject to state regulation under the state's power to promote health, safety and public welfare. *Windsor Park Baptist Church, Inc., v. Arkansas Activities Ass'n,* 658 F.2d 618 (8th Cir. 1981). See e.g. *Gray v. Gulf, Mobile & Ohio Railroad Co.,* 429 F.2d 1064 (5th Cir. 1970) (mandatory union dues); *Cook v. Spillman,* 806 F.2d 948 (9th Cir. 1986) (income taxes); *E.E.O.C. v. Mississippi College,* 626 F.2d 477 (5th Cir. 1981) (application of Title VII employment discrimination regulations).

The documents submitted by the state reveal that plaintiff, as a religious organization, would fall within

manual classification number 9062. The affidavit of John Linzinmeir reveals that as of November 19, 1987 there were 7,226 churches and religious organizations within classification number 9062, making up approximately 62% of the employers within that classification. Out of one hundred and ten Baptist churches which share religious beliefs similar to those held by plaintiff, only thirty-four are currently participating in the workers' compensation system. Defendants' evidence also reveals that during the period 1965 to 1987, employees of thirteen churches on the list of those objecting to participation in the system had filed a combined total of ninety-four claims for workers' compensations benefits, including one claim filed by an employee of plaintiff in 1977.

The affidavit of Paul C. Whitacre, Director of the Actuarial Department of the Bureau of Workers' Compensation, reveals that employers within classification 9062 paid $39,814,910.00 in premiums to the state insurance fund from 1982 to 1985. During that same period, the state incurred liability for compensation and benefits to injured workers of employers within classification 9062 in the amount of $59,099,341.00. Liability thus exceeded the amount of premiums paid by $19,284,431.00. In Mr. Whitacre's opinion, part of this deficit is attributable to the lack of premium contributions by churches which have failed to pay the necessary premiums. Mr. Whitacre further stated that as of December 31, 1985, the state insurance fund had a deficit of approximately $1,115,000,000.00, of which two percent, or approximately $22,300,000.00 was attributable to classification 9062 employers. Mr. Whitacre's opinion, within reasonable actuarial probability, was that this overall deficit could be

attributed in part to churches which had failed to pay premiums. Mr. Whitacre stated that it was within reasonable actuarial probability that total exemption of churches from participation in the system would further deplete the assets of the fund, reduce the availability of funds to pay compensation to injured workers, worsen the deficit even further, and require an increase in premium rates for all employers. Mr. Whitacre further stated that the fund deficit would be reduced if noncomplying churches paid premiums according to law. Plaintiff has submitted no evidence to contradict the opinion of Mr. Whitacre or the figures upon which his opinion is based.

The court concludes that the state has a compelling interest in assuring the efficient administration and financial soundness of the workers' compensation fund, and that providing a total exemption for churches would place a further drain upon a system which is already experiencing a staggering deficit.

As noted in *Victory Baptist Temple, Inc. v. Industrial Commission of Ohio, supra,* 442 N.E.2d at 822:

> In the instant case, the state has an "overriding governmental interest" in compensating workers and their dependents for death, occupational disease, and injury arising out of and occurring during the course of employment. To accomplish this purpose, the state has enacted comprehensive legislation creating a system which requires support by mandatory contributions by covered employers. Widespread voluntary coverage would undermine the soundness of the program and be difficult, if not impossible, to administer with the myriad of exceptions flowing from a wide variety of religious beliefs.

Assuring the efficient administration of the system and the financial soundness of the fund constitutes a compelling state interest sufficient to outweigh plaintiff's free exercise rights. The mandatory contributions may require the use of church funds which would otherwise be used for religious activities, but do not constitute a direct burden on the exercise of plaintiff's religion.

The state has not only demonstrated a compelling interest in the financial soundness of the workers' compensation system, but also in protecting the interests of the injured worker. Plaintiff has stated that it believes in providing for the needs of its injured parishioners, and offers one example of paying the medical expenses of two parishioners who were injured in an automobile accident. The workers' compensation statutes simply provide for the manner in which this goal should be achieved.

Defendants offer evidence of one claim for accidental death benefits paid to a deceased minister's widow in the amount of $212,176.00. While the state system is large enough to handle accidents of catastrophic proportion in the workplace, such as a fire involving the injury or death of several workers, an individual employer, despite the best of intentions, may not have the financial resources to provide the necessary protection and benefits for employees and their dependents.

The state's regulatory scheme is reasonable and offers the least restrictive means available in that it permits a qualified employer who genuinely would be capable of caring for its own employees to opt for self-insurance under Section 4123.35. Plaintiff has offered no evidence to demonstrate that it would be capable of

paying benefits to its injured workers. However, plaintiff is free to apply to become self-insured under Section 4123.35 if plaintiff does possess sufficient resources.

The legislature has exempted ministers and assistant ministers in the exercise of their ministries from mandatory coverage. This exception seeks to obviate excessive interference with the religious ministry of churches. The failure to extend the exception to all church employees expresses the legislative awareness that church clerical and maintenance personnel and teachers in church schools are potentially at risk in the workplace, and that the work of such employees, while perhaps furthering the religious beliefs of the church, also has secular aspects.

Plaintiff notes that other states have adopted provisions exempting ministers from coverage similar to the Ohio exemption, and that West Virginia has exempted churches from the definition of employer. However, the sole fact that a state system is not modeled after practices followed in other states does not mean that the state's system is unconstitutional. See e.g. *Martin v. Ohio*, 55 U.S.L.W. 4232 (February 25, 1987). What constitutes the least restrictive means in one state may not be the least restrictive means in another. Furthermore, the Ohio workers' compensation system is distinguishable from other statutory schemes such as the Ohio unemployment compensation laws which exempt churches entirely from participation. The Ohio unemployment compensation system, for example, is funded from a variety of sources, whereas the workers' compensation system is funded solely by employer contribution. An exemption for

churches from participation in the Worker's Compensation System would thus have a more significant financial impact upon the insurance fund than such an exemption would have upon a system with a broader contribution base.

The court finds that the Ohio Workers' Compensation System as applied to plaintiff does not violate the Free Exercise Clause of the First Amendment and that no genuine issue of material fact has been shown in that regard. The state's interests in protecting the injured worker and the financial soundness of the insurance fund are sufficient to outweigh the resulting indirect burden on plaintiff's free exercise rights, and the state has adopted the least restrictive means to further its interests.

Plaintiff's complaint also challenges the workers' compensation system as constituting a violation of the Establishment Clause of the First Amendment. In *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), the Supreme Court set forth the criteria which a statute or regulation must meet in order to survive challenge under the Establishment Clause: 1) the statute must have a secular legislative purpose; 2) the principal or primary effect must be one that neither advances nor inhibits religion; and 3) the statute must not foster an excessive government entanglement with religion.

The Ohio workers' compensation scheme meets the first test, in that it has a purely secular purpose, that being to provide compensation for injured or ill workers irrespective of their religious beliefs. Likewise, the principal or primary effect of the system is not to advance or inhibit religious beliefs.

Plaintiff claims that the resulting government entanglement with religion is excessive, particularly in light of the recordkeeping and reporting obligations imposed by the statutes. However, the degree of entanglement is clearly revealed by the terms of the Ohio workers' compensation laws. Those statutes do not require a blanket inspection of all church documents and records. Under Section 4123.23, only records relating to payroll and wage expenditures are required to be open for inspection. Employers are required to report any job-related injury or illness under Section 4123.28 and the number of employees and aggregate wages under Section 4123.26. All of these reporting requirements are essential to the operation of the workers' compensation system, which bases the amount of premiums on the degree of risk inherent in different job categories and the total payroll in each occupational class. Section 4123.29. Courts have found similar or greater reporting and inspection requirements to be constitutionally permissible. See e.g. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (minimum wage, overtime and recordkeeping requirements of the Fair Labor Standards Act upheld); *Bethel Baptist Church v. United States, supra* at 1087 (reporting and inspection requirements under social security laws upheld); *United States v. Coates*, 692 F.2d 629 (9th Cir. 1982) (inspection of records by IRS upheld).

The record contains no indication that the Bureau of Workers' Compensation, in implimenting [sic] its duties, ever exceeds the scope of authority granted by the above statutes. Mr. Linzinmeir in his affidavit disavows any intent on the part of the Bureau to interfere with the religious activities of the church or to require disclosure

of information concerning plaintiff's religious beliefs. The reporting requirements set forth in the statutes are minimal and strictly limited to the information needed to administer the workers' compensation system. The greater degree of intrusion cited by plaintiff resulting from the filing of legal action for noncompliance only occurs when the employer fails to pay premiums or to comply with the limited reporting requirements, and even then, legal action is taken only as a last resort when other informal means of resolving the dispute have failed.

The Court further notes that exempting churches from participation in the workers' compensation system would leave only common law remedies available to church employees who are injured in the workplace. Employees would have to pursue their claims through litigation in the state courts, an even more undesirable result from a scriptural standpoint. Plaintiff would encounter far more governmental involvement and entanglement through such employee litigation than it would through the activities of the Industrial Commission.

The degree of entanglement between religious organizations and the state as a result of the workers' compensation laws is minimal. This is true particularly in light of Section 4123.01(A)(2)(a), which exempts ministers and assistant ministers in the exercise of their ministries from the scope of the workers' compensation requirements. The workers' compensation system as applied to plaintiff does not violate the Establishment Clause, and the record reveals no genuine issue of fact in that regard.

Plaintiff's complaint also challenges the workers' compensation laws under the Ohio Constitution. Article II, Section 35 of the Ohio Constitution, which authorizes the legislature to establish a workers' compensation system, contains no exemptions for religious organizations. The provision in the Ohio Constitution which is comparable to the religion clauses of the First Amendment is Article I, § 7. The Ohio Supreme Court has noted that the decisions of the United States Supreme Court can be utilized to give meaning to the guarantees found in Article I of the Ohio Constitution. *State ex rel. Heller v. Miller,* 61 Ohio St.2d 6, 399 N.E.2d 66 (1980). The Ohio courts have given no indication that they would apply Article I of the Ohio Constitution more stringently than the United States Supreme Court has applied the First Amendment. See e.g. *Welch Avenue Freewill Baptist Church v. Kinney,* 10 Ohio App.3d 196, 461 N.E.2d 19 (1983); *Rand v. Rand,* 18 Ohio St.3d 356, 481 N.E.2d 609 (1985). In *Victory Baptist Temple, Inc. v. Industrial Commission of Ohio, supra,* an Ohio court of appeals upheld the constitutionality of the workers' compensation system under the First Amendment. Plaintiff has not stated a claim for relief under the Ohio Constitution.

The court finds that the pleadings and affidavits filed in the case "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Even accepting plaintiff's affidavits and evidence as true, as this court must in considering whether to grant summary judgment, *Adickes v. S. H. Kress & Co.,* 398 U.S. 144 (1970),

the unrefuted facts demonstrate that plaintiff is not entitled to the declaratory and injunctive relief requested. *Celotex v. Catrett*, 54 U.S.L.W. 4775, 4777 (June 25, 1986).

Defendants are GRANTED summary judgment.

Plaintiff is the only named plaintiff in the present case. Since the court has dismissed plaintiff's claims, there is no longer a party to serve as an adequate representative in a class action. Plaintiff's motion to certify this case as a class action and defendants' motion to strike the class allegations in the complaint are therefore moot and are DENIED.

The case is dismissed.

It is so ORDERED.

/s/ James L. Graham
JAMES L. GRAHAM
United States District Judge

Date: December 28, 1987

No. 88-3091

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SOUTH RIDGE BAPTIST CHURCH,	)	ON APPEAL
	)	from the
Plaintiff-Appellant,	)	United States
	)	District Court
v.	)	for the
	)	Southern
INDUSTRIAL COMMISSION OF OHIO, ET AL.,	)	District
	)	of Ohio.
Defendants-Appellees.	)	

Decided and Filed August 17, 1990

Before: WELLFORD and BOGGS, Circuit Judges; and ENGEL,* Senior Circuit Judge.

ENGEL, Senior Circuit Judge, delivered the opinion of the court. WELLFORD, Circuit Judge, (pp. 18-19) and BOGGS, Circuit Judge, (pp. 20-22) filed separate concurring opinions.

ENGEL, Senior Circuit Judge. This case presents the question of whether a state violates the free exercise and establishment clauses of the first amendment, U.S. Const. Amend. I, in compelling a church to pay premiums into a public workers' compensation program on behalf of its employees, where the church believes that such payments

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* Honorable Albert J. Engel assumed senior status on October 1, 1989.

are sinful. We ultimately hold that although interesting and delicate, this question has effectively been answered in the negative by the Supreme Court. We accordingly affirm the summary judgment against the church, although on somewhat different reasoning than that below.

Ohio's workers' compensation program. Ohio Rev. Code §§ 4123.01 *et seq.*, is the ordinary public insurance scheme which replaces common law liability of employers to injured employees by insurance benefits from a state-administered fund. The fund and the state's cost in administering it are financed by premiums, payable twice yearly by each employer and assessed according to the number of its employees and the accident risk of the relevant employment. §§ 4123.01, 4123.35(A), 4123.54. Participation in the program is mandatory for all employers of at least one person in the state, §§ 4123.01(B), 4123.35(A), but with two exceptions relevant here. First, "employees" is defined not to include ministers of churches. § 4123.01 (A)(2)(a). Second, an employer may elect to self-insure and pay benefits directly to its injured employees, if it can satisfy financial solvency criteria and secure the approval of the Industrial Commission. § 4123.35(B); Ohio Admin. Code § 4121-9-03. The workers' compensation program is administered by appellees Ohio Bureau of Workers' Compensation and the Industrial Commission of Ohio.

Appellant South Ridge Baptist Church is a non-profit religious corporation located in Conneaut, Ohio. In affidavits submitted on its behalf, the Church characterizes itself as " an independent, fundamental, Bible-believing, Bible-teaching and preaching church" which "strive[s] to

be absolutely obedient to fundamental doctrines of the Bible and seek[s] to operate and live in accordance with historical Baptist doctrine and marks of the New Testament church. . . . Foundational to our religious beliefs, we hold as a religious belief that the Bible is the very Word of the living God and is the supreme and final authority in religious faith and practice." Aside from its minister, the Church employs several employees. On the basis of several Biblical verses, the Church believes that to participate in the state's workers' compensation program would be to violate God's command that Jesus is the head of the Church and that its funds are God's, to be spent for Biblical purposes. The Church further believes that it has a Scriptural duty to assist its people who have been injured or fallen ill.

On April 13, 1983, the Bureau notified the Church that it must submit a payroll report and remit premiums to the Bureau. After refusing compliance with the notice and lodging objections with the Bureau, the Church filed a complaint on May 27, 1983 in the United States District Court for the Northern District of Ohio alleging that the Ohio workers' compensation statute violated 42 U.S.C. § 1983 by unconstitutionally infringing the Church's rights under the free exercise and establishment clauses. The Church sought (1) a declaration that the Ohio workers' compensation statute, as applied to the Church and similarly situated churches,[1] violates the free exercise and establishment clauses and analogous provisions of

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[1] The proposed class comprises 110 churches out of 7226 religious organizations in the State of Ohio.

the Ohio constitution, thereby mandating the Church's exemption from the program;[2] and (2) a corresponding injunction against enforcement of the statute.

Venue was properly transferred to the United States District Court for the Southern District of Ohio on July 1, 1986. On July 31, 1987, defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6). Considering this a motion for summary judgment, the district court granted defendants' motion on December 28, 1987. 676 F. Supp. 799 (S.D.Ohio 1987). The court rejected the Church's claim that the workers' compensation statutes violated the Church's free exercise rights, holding that compulsory participation in the program promoted the compelling state interests of compensating injured workers and protecting the solvency of the state-wide compensation system. Further, the court held that the scheme was the least restrictive means available for achieving those state interests because Ohio Rev. Code § 4123.35 allows a qualified employer to opt for self-insurance. The Church had never pursued that option. The district court also

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[2] The Church seeks to be exempted from an obligation to pay premiums to the workers' compensation fund. The Church apparently envisions that its employees would then be ineligible for benefits from the fund, since the Church cites with approval the West Virginia example where churches are exempt from mandatory participation in the workers' compensation program but may choose to participate in the fund and thus secure immunity from common law liability. *See* W.Va. Stat. Ann. §§ 23-2-1(5), 23-2-6 (Michie 1989). Aside from the obvious point that the Church has no authority to speak on behalf of its employees' interests, it is immaterial to our holding whether the employees would continue to be protected by the fund. *See infra* § II.

held that the workers' compensation system's recordkeeping and reporting requirements did not violate the establishment clause of the first amendment by excessively entangling church and state. In granting summary judgment, the court likewise denied class certification. The Church has appealed.

I.

Under Fed. R. Civ. P. 56(c), a moving part is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

> [T]he plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the nonmoving party has failed to make a sufficient showing on an essential element of her case with respect to which she has the burden of proof. "[T]h[e] standard [for granting summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a) . . . . " *Anderson v. Liberty Lobby, Inc.*, [477 U.S. 242, 250 (1986)].

Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). The moving party bears the burden of proving absence of a material issue of fact, and evidence produced must be viewed in a light most favorable to the nonmoving party. *Adickes v. S. H. Kress Co.*, 398 U.S. 144, 157, 159 (1970); *see also Adams v. Union Carbide Corp.*, 737 F.2d 1453 (6th Cir. 1984). there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 249. Summary judgment is improper if "there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.* at 250.

II.

When determining whether a governmental regulation impermissibly burdens individual rights under the free exercise clause of the first amendment, three factors must be weighted: the magnitude of the burden on defendant's exercise of religion; the existence of a compelling state interest justifying the burden; and the extent to which accommodation of the defendant would impede the state's objectives. *U.S. v. Schmucker*, 815 F.2d 413, 417 (6th Cir. 1987) (citing *United States v. Lee*, 455 U.S. 252, 256-60 (1982), and other cases). "The mere fact that the petitioner's religious practice is burdened by a governmental program does not mean that an exemption accommodating his practice must be granted. The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving a compelling state interest," *Thomas v. Review Board, Indiana Employment Security Division*, 450 U.S. 707,718 (1981), that is to say,

"that it is essential to accomplish an overriding governmental interest." *Lee*, 455 U.S. at 257-58 (citing *Thomas* and other cases); *see also Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Sherbert v. Verner*, 374 U.S. 398 (1963). Whether the state has made this showing depends on a comparison of "the cost to the government of altering its activity to allow the religious practice to continue unimpeded versus the cost to the religious interest imposed by the government activity." *Schmucker*, 815 F.2d at 417.

In the present case, the Bureau does not contest the sincerity of religious grounding of the Church's belief that its funds are God's alone and should be used according to God's wishes; that God commands them to use the funds to further the Church's various ministries; and that to use some of the funds to pay mandatory premiums into the state workers' compensation fund instead would be sinful. The Bureau likewise does not contest on appeal the district court's sound conclusion that the mandatory participation burdens the Church's free exercise of religion. For its part, the Church concedes that the workers' compensation program advances a compelling state interest in protecting workers and their dependents against costs of workplace accidents. The district court so held. The Church's sole complaint on appeal regarding its free exercise claim is that the lower court erred by granting summary judgment to the defendants when they had failed to prove as a matter of law that mandatory participation of all employers, including churches, was the least restrictive means towards that compelling interest.

In *United States v. Lee, supra,* the Supreme Court decided a case directly relevant to the present one, and an extensive review of that case is warranted. There, an Amish employer who objected on religious grounds to receipt of public insurance benefits and payment of taxes in support of such benefits asserted that being forced to pay the federal social security tax on behalf of his employees violated his free exercise rights. In analyzing the claim, the Court held initially that the plaintiff's beliefs must be accepted as sincere and that compulsory contribution to the social security system does indeed interfere with these beliefs. 455 U.S. at 256-57. "[T]his conclusion . . . is only the beginning, however, and not the end of the inquiry. . . . The state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." 455 U.S. at 257-58 (citing *Thomas* and other cases). Noting that the program serves important public welfare interests and that "mandatory participation is indispensable to the fiscal vitality of the social security system," the Court next concluded that "the Government's interest in assuring mandatory and continuous participation interest in assuring mandatory and continuous participation in and contribution to the social security system is very high." 455 U.S. at 258-59.

Turning to the final inquiry of "Whether accommodating the . . . [religious] belief will unduly interfere with fulfillment of the governmental interest," 455 U.S. at 259, the Court stated:

> Unlike the situation presented in *Wisconsin v. Yoder,* . . . it would be difficult to accommodate the comprehensive social security system with

myriad exceptions flowing from a wide variety of religious beliefs. . . . The tax system could not function if denominations were allowed to challenge the tax system because tax payments were spent in a manner that violates their religious belief. Because the broad public interest in maintaining a sound tax system is of such a high order, religious belief in conflict with the payment of taxes affords no basis for resisting the tax.

Congress has accommodated, to the extent compatible with a comprehensive national program, the practices of those who believe it a violation of their faith to participate in the social security system. In [26 U.S.C.] § 1402(g) Congress granted an exemption, on religious grounds, to self-employed Amish and others. Confining that § 1402(g) exemption to the self-employed provided for a narrow category which was readily identifiable. Self-employed persons in a religious community having its own "welfare" system are distinguishable from the generality of wage earners employed by others.

Congress and the courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line in § 1402(g), exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to

> support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise.

455 U.S. at 259-61 (citations and footnotes omitted). Compulsory tax payment by all employers, including religious objectors, was thus justified as "essential to accomplish an overriding governmental interest." 455 U.S. at 257-58.

Recognizing *Lee*, our circuit has held that "the Supreme Court has stated that the government's interest in revenue-raising statutes is sufficiently compelling to outweigh the free exercise rights of those who find the statute offensive to their religion." *Nelson v. United States*, 796 F.2d 164, 168 (6th Cir. 1986). Accordingly, we denied the free exercise claim of a Quaker who had been penalized for filing a frivolous income tax return because she had claimed a "war tax deduction" due to her religious beliefs against the federal governments use of tax revenues in part for military purposes. *Id.* Accord *Collett v. United States*, 781 F.2d 53, 54 (6th Cir. 1985) (*Lee* establishes that "[a] religious belief or moral belief in conflict with the payment of taxes affords no basis for resisting the tax."); *see also Graves v. Comm'r of Internal Revenue*, 579 F.2d 392, 393 (6th Cir. 1978) (in a pre-*Lee* case, holding that requirement that pacifist Quaker pay income tax which Congress chooses to spend in part for military purposes does not violate the free exercise clause, since the income tax is "neutral as to religion, . . . levied uniformly amongst persons of various beliefs, and those of no belief.").

We find ourselves unable to distinguish in any meaningful way the issues in this case from the rationale of *Lee*. Just as the Supreme Court determined in *Lee*, so do

we hold that payment of taxes in support of a public insurance program interferes with the Church's free exercise of its religious beliefs. Likewise, just as the Court found the federal government's interest in maintaining the fiscal vitality of its old age and unemployment benefits system through mandatory participation to be "very high," we have no hesitancy in holding Ohio's interest in the solvency of its workers' compensation fund to be of an equally high order. In fact, the state's interest is at least as great since it is based on the state's fundamental police power to safeguard the welfare of its citizens. The federal government, of course, is a creature of the Constitution and enjoys no such inherent power.

In the decisive final inquiry as to whether accommodation of the impaired belief unduly interferes with the governmental purpose, South Ridge Baptist argues that protesting churches might be exempted from the program. This is the same argument rejected in *Lee*. The Court there concluded that mandatory participation in the public welfare tax scheme was "essential to accomplish an overriding governmental interest." 455 U.S. at 257-58. That the taxpayer here is a church instead of an individual believer is not a meaningful distinction between this case and *Lee*. *See Bethel Baptist Church v. United States*, 822 F.2d 1334, 1339 (3d. Cir. 1987) (holding that *Lee* controls in a substantially identical social security tax case involving a church employer-taxpayer). Accordingly, because the circumstances of the present case are substantially identical to those in *Lee*, we too conclude that mandatory participation in the Ohio workers' compensation program does not violate the church's free exercise rights.

As noted above,the district court in this case identified two compelling state interests in mandatory participation in the workers' compensation program: keeping the fund solvent, and also protecting workers and their dependents. Although the district court and the parties on appeal conducted a comprehensive inquiry into whether mandatory participation was the "least restrictive means" to achieve these interests, *Lee* dispatches South Ridge Baptist's free exercise claim on the basis of the solvency interest alone. By citing *Thomas* in stating that a restriction on religious liberty must be "essential" to the compelling government interest, the Court in *Lee* appears to have implicitly incorporated the "least restrictive means" test into its holding that mandatory payment of the tax does not violate the free exercise clause. For this reason, we find unavailing the Church's arguments that the church exemption in Ohio's unemployment compensation program and a church exemption from the workers' compensation program of at least one other state indicate that as such an exemption in the Ohio workers' compensation program is a feasible and thus constitutionally required "least restrictive means."

Closely related to the Church's misunderstanding of the "least restrictive means" requirement in this context is the Church's further failure to appreciate *Lee's* teaching that accommodation of religious objections to taxation is a legislative task. The Court in *Lee* made plain that it would not second-guess legislative decisions regarding how far to accommodate religious objections to its compelling purpose in raising revenue for its programs. "The fact that Congress has already crafted some . . . exemptions in the [tax] Code also is of no consequence, for

the guiding principle is that a tax 'must be uniformly applicable to all, except as *Congress* provides explicitly otherwise.' " *Hernandez v. Comm'r of Internal Revenue*, 109 S.Ct. 2136, 2149 (1989) (quoting *Lee*; emphasis in *Hernandez*). Thus, contrary to the Church's arguments, the exemption of ministers from the definition of "employees" for whom an employer must pay workers' compensation premiums does not undercut the state's compelling interest in mandatory employer participation. Here, the minister exemption closely parallels Congress' exemption in the social security statute of the "narrow" and "readily identifiable" category of "[s]elf-employed persons in a religious community having its own 'welfare' system." 455 U.S. at 261. Neither exemption "operates to impose the employer's religious faith on the employee[]." *Id.* The same need not be true if Ohio's exemption extended to all employees of a church employer.[3] Likewise, the fact that Ohio allows a limited exemption from the program for employers who qualify and choose to self-insure does not diminish the state's compelling interest in the fund's solvency. The limited and regulated self-insurance option fully secures the state's interest in protecting its workers; it could be expected that a blanket exemption of churches would not. More importantly, however, decisions regarding the coverage of a tax program are properly for the legislative

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[3] We need not decide if the free exercise clause compels Ohio to exempt ministers. *See Lee*, 455 U.S. at 260 n.11. The point is that the Ohio legislature has made a significant and reasonably limited effort to accommodate the practices of those who believe it sinful to participate in public insurance programs.

branch. *Cf. Mozert v. Hawkins County Bd. of Education*, 827 F.2d 1058, 1079-80 (6th Cir. 1987) (Boggs, J., concurring) (plaintiffs' constitutional challenge to the content of school curricula is "a challenge to the notion of a politically-controlled school system," with which the Supreme Court has almost never interfered).

In sum, then, the political resolutions achieved in accommodating religious interests in the Ohio workers' compensation program by extending certain exemptions and withholding other cannot be compared to similar choices in other Ohio public benefit programs and in workers' compensation programs of other states. It is left to the respective legislatures to determine whether the state's compelling interest in the fiscal vitality of these programs and the underlying societal purposes would be compromised by certain selective exemptions.[4] We decline to adopt a simple and absolute "least common denominator" approach to the first amendment which fails to acknowledge that different programs within a state and similar programs in other states may have differing statutory objectives. *See New Life Baptist Church Academy v. Town of East Longmeadow*, 885 F.2d 940, 949 (1st Cir. 1989) (noting different educational standards among various states in assessing a free exercise challenge to state procedures for determining the adequacy of secular education in sectarian schools), *cert. den.*, 110 S.Ct. 1782 (1990); *cf. Martin v. Ohio*, 480 U.S. 228, 236 (1987) (in rejecting due process challenge to state criminal

[4] We note here that since 1982, the Ohio legislature has at least twice declined to pass bills to exempt churches from the workers' compensation program. *See* Appellee's Brief at 15.

procedure, the Court stated that "the question of whether . . . [a State] is in violation of the Constitution . . . is not answered by cataloging the practices of other States.").

Decision of other circuits addressing similar free exercise claims support our holding in this case. In *Bethel Baptist Church v. United States*, 822 F.2d 1334, 1338-39 (3d Cir. 1987), the Third Circuit held that a church may not assert a religious objection to public insurance to avoid paying social security taxes for its employees. The court in *Varga v. United States*, 467 F.Supp. 1113 (D.Md. 1979), *aff'd*, 618 F.2d 106 (4th Cir. 1980) (table), rejected a similar claim by a self-employed individual who objected to paying social security taxes when his religious beliefs prevented him from accepting the program's benefits. 467 F.Supp. at 1118. Also, an Ohio state court has considered and rejected a first amendment claim against the state workers' compensation tax identical to the claim at issue here. *Victory Baptist Temple v. Industrial Comm'n*, 2 Ohio App.3d 418, 442 N.E.2d 819 (1982), *cert. den.*, Ohio Case No. 82-768 (June 30, 1982), *cert. den.*, 459 U.S. 1086 (1982).

III.

To survive an establishment clause challenge, a statute must have a secular legislative purpose; the principal or primary effect of the statute must be one that neither advances nor inhibits religion; and the statute must not foster excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). Plaintiff alleges that the administrative oversight necessary to administer the workers' compensation program creates an excessive

entanglement which violates the establishment clause. The Church alleges excessive entanglement based upon: (1) inspection of church records; (2) forced disbursement of funds to a state program; (3) record-keeping and reporting; (4) categorizing employees according to risk; and (5) enforcement action for non-payment of premiums.

Ohio Rev. Code § 4123.23 requires that payroll and wage expenditures be open for inspection; section 4123.28 requires reporting of job-related injuries or illnesses; section 4123.26 requires reporting aggregate wages and number of employees. Mr. John Linzinmeir, the Assistant Director of Auditing/Underwriting for the Bureau for Workers' Compensation, stated in an affidavit submitted with the summary judgment motion that payroll reports are sent to employers every six months and must be completed and returned, with the employer being responsible for calculating the premium due; that audits are conducted whenever requested by the employer or when the employer is in default; that audits and investigations do not seek information about the religious beliefs of the clergy or congregation; and that the Bureau does not seek to interfere with the workings of the church or the school.

The district court's legal analysis and conclusion on this issue is sound, with one exception,[5] and is affirmed.

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[5] This court's affirmance of the district court on this issue does not extend to its remark that if the Church were exempted from the workers' compensation program, an injured employee dissatisfied with the Church's charity would have to pursue

(Continued on following page)

The opinion is further bolstered by intervening holdings of the Supreme Court. *See Jimmy Swaggert Ministries v. Bd. of Equalization*, 110 S.Ct. 688, 698 (1990) ("Collection and payment of the [sales tax at issue] will of course require some contact between appellant and the State, but we have held that generally applicable administrative and recordkeeping regulations may be imposed on [a] religious organization without running afoul of the Establishment Clause."), and *Hernandez*, 109 S.Ct. at 2147 ("[R]outine regulatory interaction [such as application of neutral tax laws] which involves no inquiries into religious doctrine, . . . no delegation of state power to a religious body, . . . and no 'detailed monitoring and close administrative contact' between secular and religious bodies, . . . does not of itself violate the nonentanglement command."). It follows from these cases as well that the district court correctly ruled that the Church had presented no valid establishment clause claim here as a matter of law.

* * *

The remarkably successful history of the United States over the last two centuries is undoubtedly due to many factors unique in the long common experience of humankind. However, of exceptional importance has been the tolerance of its institutions and citizenry for the thoughts and beliefs of others. The variety of religious

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(Continued from previous page)

common law remedies against it in the state courts, "an even more undesirable result from a scriptural standpoint." 676 F.Supp. at 807. Aside from being irrelevant, this determination seems inappropriate. "Courts are not arbiters of scriptural interpretation." *Thomas*, 450 U.S. at 716.

thought and expression has been extraordinary, and the freedom of expression and religious worship fostered by the first amendment has brought to the American dream a rich and varied heritage unparalleled elsewhere. While our chief guarantee has been the first amendment, that document alone cannot be entirely self-operating but demands the constant support of a tolerant electorate and a sensitive, healthy, and effective system for self-government. Unless the civil government is free to address and solve the contemporary concerns and necessities of its citizenry, it cannot survive and, in corollary, command the kind of respect and consensus which enables religious toleration and religion itself in its hundreds of variant forms to flourish. This is why, as the Supreme Court recognized in *Yoder*, "even when religiously based, [one's activities] are often subject to regulation by the state in the exercise of their undoubted power to promote the health, safety and general welfare. . . . " 406 U.S. at 220. The South Ridge Baptist Church is undoubtedly subject to a variety of state public welfare regulations, from the zoning, building and fire codes applicable to its place of worship, *see, e.g., Lakewood Ohio Congregation of Jehovah's Witnesses, Inc. v. City of Lakewood*, 699 F.2d 303, 306-07 (6th Cir. 1983) (zoning regulations preventing church from constructing place of worship on its property do not violate the free exercise clause); *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 243-44 (4th Cir. 1984) (health and safety regulations applicable to sectarian child care center do not burden free exercise rights), to federal minimum wage and other labor standards governing the Church's employment practices. *See Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S 290,

303-05 (1985) (application of the Fair Labor Standards Act to a non-profit religious organization does not violate the free exercise clause). That religious objections to such social ordering are respected does not mean they must be heeded. "[E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs." *Lee*, 455 U.S. at 261. We respect the Church's objections to the workers' compensation system and its remarkable devotion to its religious beliefs in every aspect of life. Where such beliefs clash with important state interests in the welfare of others, however, accommodation is not constitutionally mandated.

Undoubtedly many policies and practices of any civil government will from time to time be repugnant to even the best intentioned beliefs of a given group, especially where the government seeks to order a pluralistic society encompassing many ethnic groups and the widest possible variety of religious beliefs, often historically at variance with one another. Undoubtedly such a situation exists here, where the civil government of Ohio and its electorate has deemed it necessary to enact a workers' compensation law of broad application even though it may run afoul of the prevailing dogma of a given church or sect. It is difficult to say that such a law unconstitutionally impacts upon one group, where the burden of the law is spread equally and it does not single out that group for separate or discriminatory treatment. The impact upon the South Ridge Baptist Church of the workman's compensation laws is no different than the impact upon any other employer of individuals in the State of Ohio of the same premium rate class. Under such circumstances the civil government is not required, in our view,

to yield its legitimate powers to provide for the general welfare and to accept a diminution of its responsibilities out of deference to the peculiar and particular views of one of many divergent religious or political sects.[6]

AFFIRMED.

WELLFORD, Circuit Judge, concurring:

I concur with the reasoning and rationale of Judge Engel's opinion. This is a close and troubling case with respect to whether there are any less "restrictive means" to provide workers' compensation coverage for church-related employees than Ohio has taken. Plaintiff has demonstrated none in my view. It may be logical to assume, as argued by plaintiff, that the risk of injury in church-related jobs is less than in business and industry generally, but presumably the Ohio rate system gives a lower rate to those employers with fewer claims. It is a policy decision for the state to permit reasonable exemptions or exceptions from coverage.

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[6] We note further that nothing to our knowledge compels an employee of the church who entertains similar views as a matter of personal conviction to accept any of the benefits conferred by the workman's compensation law where he or she would otherwise be entitled to them. On the other hand, to preclude some other employee not exercising such belief from the benefits of the Act merely because the Church itself opposes them or prefers to provide for them in a different manner, could not escape the prospective danger of denying that employee the equal protection of the state's law merely because of the personal religious beliefs of his employer.

Plaintiff has submitted affidavits that it operates a school or academy in conjunction with the church, which Robert B. Woodard, the school's principal, has said is a part of "the Church's day school ministry." We do not know whether employees and teachers in this school are considered "church" employees, but Woodard also serves as a "pastor to the deaf." Deborah Miller, another affiant, says she is a teacher in the academy, a church member, as well as a part of the church's "county home ministry," and has been a part of its "college ministry." Ms. Miller says also that she is "a part of [the plaintiff church's] staff." We have reason, then, to believe that plaintiff operates with a staff larger than might be expected in the usual rural Ohio church.

Ohio's Director of the Actuarial Department submitted an affidavit also indicating that the state has taken in some $39,000,000 in premiums from the "classification that covers religious organizations such as churches" from 1982 to 1985. During that same period "the State incurred liability" of some $59,000,000 "in compensation and benefits to those injured workers of employers," such as plaintiff. This data indicates a substantial deficit in premiums necessary to cover workers' compensation benefits to church (and related entity) employees. This data demonstrates a strong need that all church employers be included among all other covered employers as premium payers to help with this deficit. (The system as a whole has accumulated a deficit exceeding one billion dollars as of December 31, 1985.)

In addition, Ohio does have a provision in its workers' compensation laws that allows qualified employers to be self-insurers, thus avoiding some of the

burdens of reporting to the state as covered employers. there is no indication that this particular church, nor that Christian churches as a class, has been treated differently under the Ohio law than other like employers or any other religious group. Plaintiff apparently did not choose to pursue this option.

I join, therefore, in affirming the district court decision.

BOGGS, Circuit Judge, concurring. I write separately because I do not believe that every scheme that taxes religious institutions along with other institutions in our society will necessarily pass muster under the free exercise clause. The court rests its opinion predominantly on the social security case of *United States v. Lee*, 455 U.S. 252 (1982). Because of the highly diverse and mobile nature of our society, with an individual frequently working for many employers during a working lifetime, and because of the need to maintain actuarial soundness over periods of half a century or more, the social security system represents one of the most compelling justifications for legislative decision to adopt a uniform system with no exemptions. *Id.* at 258-59.

Workers' compensation, on the other hand, is essentially a financing system for contractual arrangements between worker and employer. It would not generally interrupt a coherent scheme for the society to do any of the following:

(1) Allow religiously objecting employers to self-insure, thus insuring that they would not be "looted" through excessive premiums for the benefit of secular employers;

(2) Require, either through direct employee purchase, or employer purchase, insurance providing the same benefits as workers' compensation;[1]

(3) Allow employees who wish to work for religiously based enterprises, such as the Church here, to opt out of workers' compensation and take their chances with the tort system, if they so choose.

Of course, as the court has indicated, the state of Ohio does provide the first option, and the church has made no attempt to exercise it. Under these circumstances, the concern expressed by the state, that employers such as the church are money-losers for the state, takes on greater persuasiveness.

The state's figures are, however, not ironclad for the proposition that the plaintiff and similar churches would not be subsidizing the rest of the state. The state's statistics are for an employer class only 62% of which are churches. Of those churches, less that 5% are churches with religious scruples similar to those of plaintiff. It is thus possible that additional fact-finding might develop that there is a good probability that the state wants to force the churches into the system because they are money-makers for the system. However, the plaintiff has submitted no affidavits to that effect.

Finally, the Supreme Court's quite recent decision in *Employment Division, Department of Human Resources of*

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[1] It would not matter in ultimate compensation or effect whether the employer or employee had to make the purchase. The costs would represent a cost of employment either way. *See e.g.*, R. MILLER, Economics Today at 124 (1973)

Oregon v. Smith, 110 S. Ct. 1595, 1600 (1990), indicates that the right of free exercise is limited by the necessity "to comply with a valid and neutral law of general applicability." Despite the Supreme Court's previous jurisprudence in cases such as *Sherbert v. Verner*, 374 U.S. 398 (1963), the Court now seems to be moving strongly away from those cases. In *Smith*, Justice Scalia stated for the Court that *Sherbert* test of "compelling governmental interest" had never really been applied outside the unemployment compensation context, and never successfully applied. *Id.* at 1602.

In the unemployment compensation cases, the states made arguments similar to those here, that the state unemployment compensation funds might be depleted by the withdrawal of tax revenues, but those claims were brushed aside by the Supreme Court. *See, e.g., Sherbert*, 374 U.S. at 407; *Thomas v. Review Board*, 450 U.S. 707, 718-719, 723 n.1 (1981). Certainly, it would be difficult for an objective observer of the problems that could be caused by the exemption sought by plaintiff here (whether those problems be to the state fund or to workers who choose to enter religious employment) to believe that the government interest could meet the standard ringingly set forth in *Sherbert:*

> [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.

Sherbert, 374 U.S. at 406 (quoting *Thomas v. Collins*, 323 U.S. 516, 530 (1945)).

Since the Supreme Court now appears to have confined the applicability of those words to the rather limited field of unemployment compensation, I must reluctantly concur in the court's opinion.

OHIO CONST. ART. II, § 35

Workers' compensation

For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom. Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries or occupational disease, and any employer who pays the premium or compensation provided by law, passed in accordance herewith, shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease. Laws may be passed establishing a board which may be empowered to classify all occupations, according to their degree of hazard, to fix rates of contribution to such fund according to such classification, and to collect, administer and distribute such fund, and to determine all rights of claimants thereto. Such board shall set aside as a separate fund such proportion of the contributions paid by employers as in its judgment many be necessary, not to exceed one per centum thereof in any year, and so as to equalize, insofar as possible, the burden thereof, to be expended by such board in such manner as may be provided by law for the investigation and prevention of industrial accidents and diseases. Such board shall have full power and authority to hear and determine whether or not an injury, disease or death resulted because of the failure of the employer to comply with any specific

requirement for the protection of the lives, health or safety of employees, enacted by the general assembly or in the form of an order adopted by such board, and its decision shall be final; and for the purpose of such investigations and inquiries it may appoint referees. When it is found, upon hearing, that an injury, disease or death resulted because of such failure by the employer, such amount as shall be found to be just, not greater than fifty nor less than fifteen per centum of the maximum award established by law, shall be added by the board, to the amount of the compensation that may be awarded on account of such injury, disease, or death, and paid in like manner as other awards; and, if such compensation is paid from the state fund, the premium of such employer shall be increased in such amount, covering such period of time as may be fixed, as will recoup the state fund in the amount of such additional award, notwithstanding any and all other provisions in this constitution.

OHIO REVISED CODE ANNOTATED

§ 4123.01 Definitions.

As used in Chapter 4123 of the Revised Code:

(A)(1) "Employee," "workman," or "operative" means:

(a) Every person in the service of the state, or of any county, municipal corporation, township, or school district therein, including regular members of lawfully constituted police and fire departments of municipal corporations and townships, whether paid or volunteer, and wherever serving within the state or on temporary assignment outside thereof, and executive officers of boards of education, under any appointment or contract of hire, express or implied, oral or written, including any elected official of the state, or of any county, municipal corporation, or township, or members of boards of education;

(b) Every person in the service of any person, firm, or private corporation, including any public service corporation, that (i) employs one or more workmen or operatives regularly in the same business or in or about the same establishment under any contract of hire, express or implied, oral or written, including aliens and minors, household workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single household and casual workers who earn one hundred sixty dollars or more in cash in any calendar quarter from a single employer, or (ii) is bound by any such contract of hire or by any other written contract, to pay into the state

insurance fund the premiums provided by Chapter 4123. of the Revised Code.

Every person in the service of any independent contractor or subcontractor who has failed to pay into the state insurance fund the amount of premium determined and fixed by the industrial commission for his employment or occupation or to elect to pay compensation directly to his injured and to the dependents of his killed employees, as provided in section 4123.35 of the Revised Code, shall be considered as the employee of the person who has entered into a contract, whether written or verbal, with such independent contractor unless such employees or their legal representatives or beneficiaries elect, after injury or death, to regard such independent contractor as the employer.

(2) "Employee," "workman," or "operative" does not mean:

(a) A duly ordained, commissioned, or licensed minister or assistant or associate minister of a church in the exercise of his ministry; or

(b) Any officer of a family farm corporation.

Any employer may elect to include as an "employee" within this chapter, any person excluded from the definition of "employee" pursuant to division (A)(2)(a) of this section. If an employer is a partnership, sole proprietorship, or family farm corporation, such employer may elect to include as an "employee" within this chapter, any member of such partnership, the owner of the sole proprietorship, or the officers of the family farm corporation. In the event of an election, the employer shall serve upon

the commission written notice naming the persons to be covered, include such employee's remuneration for premium purposes in all future payroll reports, and no person excluded from the definition of "employee" pursuant to division (A)(2)(a) of this section, proprietor, or partner shall be deemed an employee within this division until the notice has been served.

For informational purposes only, the bureau of workers' compensation shall prescribe such language as it considers appropriate, on such of its forms as it considers appropriate, to advise employers of their right to elect to include as an "employee" within this chapter a sole proprietor, any member of a partnership, the officers of a family farm corporation, or a person excluded from the definition of "employee" under division (A)(2)(a) of this section, and that they should check any health and disability insurance policy, or other form of health and disability plan or contract, presently covering them, or the purchase of which they may be considering, to determine whether such policy, plan, or contract excludes benefits for illness or injury that they might have elected to have covered by workers' compensation.

(B) "Employer" means:

(1) The state, including state hospitals, each county, municipal corporation, township, school district, and hospital owned by a political subdivision or subdivisions other than the state;

(2) Every person, firm, and private corporation, including any public service corporation, that (a) has in service one or more workmen or operatives regularly in the same business or in or about the same establishment

under any contract of hire, express or implied, oral or written, or (b) is bound by any such contract of hire or by any other written contract, to pay into the insurance fund the premiums provided by Chapter 4123. of the Revised Code.

All such employers are subject to Chapter 4123. of the Revised Code. Any member of a firm or association, who regularly performs manual labor in or about a mine, factory, or other establishment, including a household establishment, shall be considered a workman or operative in determining whether such person, firm, or private corporation, or public service corporation, has in its service, one or more workmen and the income derived from such labor shall be reported to the industrial commission as part of the payroll of such employer, and such member shall thereupon be entitled to all the benefits of an employee.

(C) "Injury" includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment. "Injury" does not include:

(1) Psychiatric conditions except where the conditions have arisen from an injury or occupational disease;

(2) Injury or disability caused primarily by the natural deterioration of tissue, an organ, or part of the body;

(3) Injury or disability incurred in voluntary participation in an employer-sponsored recreation or fitness activity if the employee signs a waiver of his right to compensation or benefits under Chapter 4123. of the

Revised Code prior to engaging in the recreation or fitness activity.

(D) "Child" includes a posthumous child and a child legally adopted prior to the injury.

(E) "Family farm corporation" means a corporation founded for the purpose of farming agricultural land in which the majority of the voting stock is held by and the majority of the stockholders are persons or the spouse of persons related to each other within the fourth degree of kinship, according to the rules of the civil law, and at least one of the related persons is residing on or actively operating the farm, and none of whose stockholders are a corporation. A family farm corporation does not cease to qualify under this division where, by reason of any devise, bequest, or the operation of the laws of descent or distribution, the ownership of shares of voting stock is transferred to another person, as long as that person is within the degree of kinship stipulated in this division.

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§ 4123.12 Attachment proceeding to compel obedience

In case any person fails to comply with an order of the industrial commission or subpoena issued by the commission, its secretary, or director of claims, or any of its inspectors, examiners, or claims referees, or on the refusal of a witness to testify to any matter regarding which he may be lawfully interrogated, or if any person refuses to permit an inspection, the probate judge of the county in which the person resides, on application of any

member of the commission, its secretary, or director of claims, or any inspector, examiner, or claims referee appointed by it, shall compel obedience by attachment proceedings as for contempt, as in the case of disobedience of the requirements of subpoena issued from such court on a refusal to testify therein.

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§ 4123.19 Expenditure for statistical information

The industrial commission may make necessary expenditures to obtain statistical and other information to establish the classes provided for in section 4123.29 of the Revised Code.

The salaries and compensation of the members of the commission, of the secretary, and all actuaries, accountants, inspectors, examiners, experts, clerks, physicians, inspectors, examiners, experts, clerks, physicians, stenographers, and other assistants, and all other expenses of the commission, including the premium to be paid by the treasurer of state for the bond to be furnished by him, shall be paid out of the state treasury upon vouchers signed by two of the members of such commission and presented to the auditor of state, who shall issue his warrant therefore as in other cases.

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§ 4123.23 Inspection of books, records, and payrolls

All books, records, and payrolls of the employers of the state, showing or reflecting in any way upon the

amount of wage expenditure of such employers, shall always be open for inspection by the industrial commission, or any of its traveling auditors, inspectors, or assistants, for the purpose of ascertaining the correctness of the wage expenditure, the number of men employed, and such other information as is necessary for the uses and purposes of the commission in its administration of the law.

Refusal on the part of any employer to submit his books, records, and payrolls for the inspection of any member of the commission or traveling auditor, inspector, or assistant presenting written authority from the commission shall subject such employer to a forfeiture of one hundred dollars for each such offense, to be collected by civil action in the name of the state, and paid into the state insurance fund.

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§ 4123.24 Payroll to be kept

Every employer amenable to sections 4123.01 to 4123.94, inclusive, of the Revised Code, shall keep, preserve, and maintain complete records showing in detail all expenditures for payroll and the division of such expenditures into the various divisions and classifications of the employer's business. Such records shall be preserved for at least five years after the respective times of the transactions upon which such records are based.

All books, records papers, and documents reflecting upon the amount and the classifications of the payroll expenditures of an employer, shall be kept available for

inspection at any time by the industrial commission or any of its assistants, agents, representatives, or employees. If an employer fails to keep, preserve, and maintain such records and other information reflecting upon payroll expenditures, fails to make such records and information available for inspection, or fails to furnish to the commission or any of its assistants, agents, representatives, or employees, full and complete information in reference to expenditures for payroll when such information is requested, the commission may determine the amount of premium due from the employer upon such information as is available to it, and its findings are prima-facie evidence of the amount of premium due from the employer.

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§ 4123.26 Annual statement by employer; forfeiture

Every employer shall keep records, of, and furnish to the industrial commission upon request, all information required by the commission to carry out Chapter 4123, of the Revised Code. In January of each year, every employer of the state employing one or more employees regularly in the same business, or in or about the same establishment shall prepare and mail to the commission at its main office in Columbus a statement containing the following information:

(A) The number of employees employed during the preceding year from the first day of January through the thirty-first day of December;

(B) The number of such employees employed at each kind of employment and the aggregate amount of wages paid to such employees.

Such information shall be furnished on a blank to be prepared by the commission. The commission shall furnish such blanks to employers free of charge upon request therefor. Every employer receiving from the commission any blank, with directions to fill out the same, shall cause the same to be properly filled out so as to answer fully and correctly all questions therein propounded, and give all the information therein sought, or if unable to do so, he shall give to the commission in writing good and sufficient reasons for such failure. The commission may require that the information required to be furnished be verified under oath and returned to the commission within the period fixed by it or by law. The commission or any member thereof, or any person employed by the commission for that purpose, may examine, under oath, any employer, or the officer, agent, or employee thereof, for the purpose of ascertaining any information which such employer is required to furnish to the commission.

No employer shall fail to furnish to the commission the annual statement required by this section, nor shall any employer fail to keep records of or furnish such other information as may be required by the commission under this section.

Whoever violates this section shall forfeit five hundred dollars, to be collected in a civil action brought

against said employer in the name of the state, to be paid into the state insurance fund and become a part thereof.

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§ 4123.28 Record of injuries and occupational diseases; report; failure to file report

Every employer in this state shall keep a record of all injuries and occupational diseases, fatal or otherwise, received or contracted by his employees in the course of their employment and resulting in seven days of more of total disability. Within a week after acquiring knowledge of such an injury or death therefrom, and in the event of occupational disease or death therefrom, within one week after acquiring knowledge of or diagnosis of or death from said occupational disease or of a report to such employer of such occupational disease or death, a report thereof shall be made in writing to the industrial commission upon blanks to be procured from the commission for that purpose. Such report shall state the name and nature of the business of the employer, the location of his establishment or place of work, the name, address, nature and duration of occupation of the injured, disabled, or deceased employee and, the time, the nature, and the cause of injury, occupational disease, or death, and such other information as is required by the commission.

The employer shall give a copy of each such report to the employee it concerns or his surviving dependents.

No employer shall refuse or neglect to make any report required by this section.

Each day that an employer fails to file a report required by this section constitutes an additional day within the time period given to a claimant by the applicable statute of limitations for the filing of a claim based on the injury or occupational disease, provided that a failure to file a report shall not extend the applicable statute of limitations for more than two additional years.

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§ 4123.29 Rates of premium; state insurance fund; alternative premium plans; duty to disseminate information

(A) The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same, based upon the total payroll in each of said classes of occupation or industry sufficiently large to provide a fund for the compensation provided for in Chapter 4123 of the Revised Code, and to maintain a state insurance fund from year to year. The rates shall be set at a level that assures the solvency of the fund. Where the payroll cannot be obtained or, in the opinion of the commission, is not an adequate measure for determining the premium to be paid for the degree of hazard, the commission may determine the rates of premium upon such other basis, consistent with insurance principles, as is equitable in view of the degree of hazard, and whenever in such sections reference is made to payroll or expenditure of wages with reference to fixing premiums, such reference shall be construed to have been made also to such other

basis for fixing the rates of premium as the commission may determine under this section.

The commission in setting or revising rates shall furnish to employers an adequate explanation of the basis for the rates set.

(B) The commission, in conjunction with the bureau of workers' compensation, shall develop and make available to employers who are paying premiums to the state insurance fund alternative premium plans. Alternative premium plans shall include retrospective rating plans. The commission may make available plans under which an advanced deposit may be applied against a specified deductible amount per claim, and a plan that groups, for rating purposes, employers of similar size and risk, and pools the risk of the employers within the group. In no event shall this be construed as granting to an employer the privilege to pay compensation or benefits directly.

The commission, in conjunction with the bureau, shall develop classifications of occupations or industries that are sufficiently distinct so as not to group employers in classifications that unfairly represent the risks of employment with the employer.

(C) The administrator shall generally promote employer participation in the state insurance fund through the regular dissemination of information to all classes of employers describing the advantages and benefits of opting to make premium payments to the fund. To that end, the administrator shall regularly make employers aware of the various workers' compensation

premium packages developed and offered pursuant to this section.

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§ 4123.30 Public fund; private fund; contributions; disbursements

Money contributed by the employers mentioned in division (B)(1) of section 4123.01 of the Revised Code constitutes the "public fund" and the money contributed by employers mentioned in division (B)(2) of such section constitutes the "private fund." Each such fund shall be collected, distributed, and its solvency maintained without regard to or reliance upon the other. Whenever in sections 4123.01 to 4123.94 of the Revised Code, reference is made to the state insurance fund, such reference is to such two separate funds but such two separate funds and the net premiums contributed thereto by employers after adjustments and dividends, except for the amount thereof which is set aside for the investigation and prevention of industrial accidents and diseases pursuant to Section 35 of Article II, Ohio Constitution, any amounts set aside for actuarial services authorized or required by sections 4123.44 and 4123.47 of the Revised Code or for fees and costs authorized by section 4123.51 of the Revised Code, and any amounts set aside to reinsure the liability of the respective insurance funds for the following payments, constitute a trust fund for the benefit of employers and employees mentioned in sections 4123.01, 4123.03, and 4123.73 of the Revised Code for the payment of compensation, medical services, examinations, recommendations

and determinations, nursing and hospital services, medicine, rehabilitation, death, benefits, funeral expenses, and like benefits for loss sustained on account of injury, disease, or death provided for by sections 4123.01 to 4123.94 of the Revised Code, and for no other purpose. This section does not prevent the deposit or investment of all such moneys intermingled for such purpose but such funds shall be separate and distinct for all other purposes, and the rights and duties created in sections 4123.01 to 4123.94 of the Revised Code, shall be construed to have been made with respect to two separate funds and so as to maintain and continue such funds separately except for deposit or investment. Disbursements shall not be made on account of injury, disease, or death of employees or employers who contribute to one of such funds unless the moneys to the credit of such fund are sufficient therefor and no such disbursements shall be made for moneys or credits paid or credited to the other fund.

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§ 4123.35 Payments to insurance fund; self-insuring employees

(A) Except as provided in this section, every employer mentioned in division (B)(2) of section 4123.01 of the Revised Code, and every publicly owned utility shall semiannually in the months of January and July pay into the state insurance fund the amount of premium fixed by the industrial commission for the employment or

occupation of such employer, the amount of which premium to be so paid by each such employer to be determined by the classifications, rules, and rates made and published by said commission. Such employer shall semiannually pay such further sum of money into the state insurance fund as may be ascertained to be due from him by applying the rules of said commission, and a receipt or certificate certifying that such payment has been made shall immediately be mailed to such employer by the commission, which receipt or certificate, attested by the seal of said commission, is prima-facie evidence of the payment of such premium.

The bureau of workers' compensation shall verify with the secretary of state the existence of all corporations and organizations making application for workers' compensation coverage and shall require every such application to include the employer's federal identification number.

An employer as defined in division (B)(2) of section 4123.01 of the Revised Code who has contracted with a subcontractor shall be liable for the unpaid premium due from any such subcontractor with respect to that part of the payroll of the subcontractor which is for work performed pursuant to the contract with such employer.

Provided, that as to all employers who were subscribers to the state insurance fund prior to January 1, 1914, or who may first become subscribers to said fund in any other month than January or July, this division providing for the payment of such premiums semiannually does not apply, but such semiannual premiums shall be paid by such employers from time to time upon the

expiration of the respective periods for which payments into the fund have been made by them.

(B) Provided, that such employers and publicly owned utilities who will abide by the rule of the commission and who may be of sufficient financial ability to render certain the payment of compensation to injured employees or the dependents of killed employees, and the furnishing of medical, surgical, nursing, and hospital attention and services and medicines, and funeral expenses, equal to or greater than is provided for in sections 4123.52, 4123.55 to 4123.62, and 4123.64 to 4123.67 of the Revised Code, and who do not desire to insure the payment thereof or indemnify themselves against loss sustained by the direct payment thereof, may, upon a finding of such facts by the commission, be granted the privilege to pay individually such compensation, and furnish such medical, surgical, nursing, and hospital services and attention and funeral expenses directly to such injured employees or the dependents of such killed employees. The commission may charge employers or publicly owned utilities who apply for the privilege of paying compensation directly a reasonable application fee to cover the commission's costs in connection with processing and making a determination with respect to an application. All employers granted the privilege to pay compensation directly shall demonstrate sufficient financial and administrative ability to assure that all obligations under this section are promptly met. The commission shall deny the privilege where the employer is unable to demonstrate his ability to promptly meet all the obligations imposed on him by this section. The commission shall consider, but is not limited to, the following

factors, where applicable, in determining, the employer's ability to meet all of the obligations imposed on him by this section:

(1) The employer employs a minimum of five hundred employees in this state;

(2) The employer has operated in this state for a minimum of two years, provided that an employer who has purchased, acquired, or otherwise succeeded to the operation of a business, or any part thereof, situated in this state that has operated for at least two years in this state, shall also qualify;

(3) Where the employer previously contributed to the state insurance fund or is a successor employer as defined by commission rules, the amount of the buy-out, as defined by commission rules:

(4) The sufficiency of the employer's assets located in this state to insure the employer's solvency in paying compensation directly;

(5) The financial records, documents, and data, certified by a certified public accountant, necessary to provide the employer's full-financial disclosure. The records, documents, and data include, but are not limited to, balance sheets and profit and loss history for the current year and previous four years.

(6) The employer's organizational plan for the administration of the workers' compensation law;

(7) The employer's proposed plan to inform employees of the change from a state fund insurer to a self-insurer, the procedures the employer will follow as a

self-insurer, and the employees' rights to compensation and benefits; and

(8) The employer has either an account in a financial institution in this state, or if the employer maintains an account with a financial institution outside this state, ensures that workers' compensation checks are drawn from the same account as payroll checks or the employer clearly indicates that payment will be honored by a financial institution in this state.

The commission may, waive the requirements of divisions (B)(1) and (2) of this section. The commission shall not grant the privilege to pay compensation directly to any public employer, other than publicly owned utilities.

(C) The commission shall require a surety bond from employers and publicly owned utilities who are granted the privilege to pay compensation directly, issued pursuant to section 4123.351 [4123.35.1] of the Revised Code, that is sufficient to compel, or secure to injured employees, or to the dependents of employees as may be killed, the payment of such compensation and expenses, which shall in no event be less than that paid or furnished out of the state insurance fund in similar cases to injured employees or to dependents of killed employees whose employers contribute to said fund, except when an employee of such employer, who has suffered the loss of a hand, arm, foot, leg, or eye prior to the injury for which compensation is to be paid, and thereafter suffers the loss of any other of said members as the result of any injury sustained in the course of and arising out of his employment, the compensation to be paid by such employer and publicly owned utility shall

be limited to the disability suffered in the subsequent injury, additional compensation, if any, to be paid by the commission out of the surplus created by section 4123.34 of the Revised Code.

(D) In addition to the requirements of this section, the commission shall make and publish rules governing the manner of making application and the nature and extent of the proof required to justify such finding of fact by said commission as to granting the privilege to such employers and publicly owned utilities, which rule shall be general in their application, one of which rules shall provide that all employers, including publicly owned utilities, granted the privilege to compensate directly their injured employees and the dependents of their killed employees, shall pay into the state insurance fund such amounts as are required to be credited to the surplus in division (B) of section 4123.34 of the Revised Code. Employers shall secure directly from the commission and bureau central offices application forms upon which the bureau shall stamp a designating number. Prior to submission of an application, an employer shall make available to the bureau, and the bureau shall review, the information described in divisions (B)(1) to (8) of this section. An employer shall file the completed application forms with an application fee, which shall cover the costs of processing the application, as established by the commission, by rule, with the bureau and the commission at least ninety days prior to the effective date of the employer's new status as a self-insurer. The application form shall not be deemed complete until all the required information is attached thereto. The commission and

bureau shall only accept applications which contain the required information.

(E) The commission shall review completed applications within a reasonable time. If the commission determines to grant the privilege of self-insurance, the bureau shall issue a statement, containing the commission's findings of fact, that is prepared by both the commission and the bureau and signed by the chairman and secretary of the commission. If the commission determines not to grant the privilege of self-insurance, the bureau shall notify the employer of the determination and require the employer to continue to pay its full premium into the state insurance fund. The commission also shall adopt rules establishing a minimum level of performance as a criterion for granting and maintaining the privilege to pay compensation directly and fixing time limits beyond which failure of the self-insuring employer to provide for the necessary medical examination and evaluations may not delay a decision on a claim.

(F) The commission shall adopt rules setting forth procedures for auditing the program of employers that are granted the privilege to pay compensation directly Audits shall be conducted by the bureau of workers' compensation upon a random basis or whenever the bureau has grounds for believing that an employer is not in full compliance with commission rules or Chapter 4123. of the Revised Code. The bureau shall report its findings to the commission.

The administrator of the bureau of workers' compensation shall monitor the programs conducted by

self-insuring employers, to ensure compliance with commission requirements and for that purpose, shall develop and issue to employers who pay compensation directly standardized forms for use by the employer in all aspects of the employers' direct compensation program and for reporting of information to the bureau.

The bureau shall receive and transmit to the commission and to the employer all complaints concerning any employer engaged in paying compensation directly to employees. In the case of a complaint against a self-insuring employer, the administrator shall handle the complaint through the self-insurance section of the bureau. The commission shall maintain a file by employer of all complaints received that relate to the employer. The commission shall evaluate each complaint and take appropriate action.

The commission shall adopt as a rule a prohibition against any employer who is granted the privilege to pay compensation directly from harassing, dismissing, or otherwise disciplining any employee making a complaint which rule shall provide for a financial penalty to be levied by the commission payable by the offending employer.

(G) For the purpose of making determinations as to whether to grant self-insuring status to an employer or publicly owned utility, the commission may subscribe to and pay for a credit reporting service that offers financial and other business information about individual employers. The costs in connection with the commission's subscription or individual reports from the service about

an applicant may be included in the application fee charged employers under this section.

(H) The commission may, notwithstanding other provisions of Chapter 4123 of the Revised Code, permit an employer who has been granted the privilege of paying compensation directly to resume payment of premiums to the state insurance fund with appropriate credit modifications to the employer's basic premium rate as such rate is determined pursuant to section 4123.29 of the Revised Code.

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§ 4123.76 Claim against noncomplying employer a lien

When an application for compensation or benefits or an application for further compensation or benefits is filed with the industrial commission under section 4123.75 of the Revised Code against an employer who has not complied with section 4123.35 of the Revised Code, the commission shall make and file for record in the office of the county recorder in the counties where such employer's property is located, an affidavit showing the date on which such application was filed with the commission, the name and address of the employer against whom it was filed, and the fact that said employer had not complied with section 4123.35 of the Revised Code. The recorder shall accept and file such affidavit and record the same as a mortgage on real estate and shall file the same as a chattel mortgage and he shall index the

same as a mortgage on real estate and as a chattel mortgage. A copy of the application shall be filed with the affidavit. A copy of such affidavit shall be served upon the employer by the commission. Such affidavit constitutes a valid lien from the time of filing, in favor of the commission upon the real property and tangible personal property of such employer located within the county. The commission shall have such lien canceled of record after the employer has paid to the claimant or to the commission the amount of the compensation or benefits which has been ordered paid to the claimant, or when the application has finally been denied after the claimant has exhausted the remedies provided by law in such cases, or when the employer has filed a bond in such amount and with such surety as the commission approves conditioned on the payment of all sums ordered paid to the claimant. The recorder shall make no charge for the services provided by this section to be performed by him.

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§ 4123.78 Recording of certificate of noncompliance

If any employer fails to comply with section 4123.35 of the Revised Code in accordance with the rules of the industrial commission, the commission shall file with the county recorder of any counties in which such employer's property may be located its certificate of the amount of premium due from such employer and such amount shall be a lien from the date of such filing against the real property and personal property of the employer within the county in which such certificate is filed. The recorder shall accept and file such certificate and record

the same as a mortgage on real estate and shall file the same as a chattel mortgage and he shall index the same as mortgage on real estate and as a chattel mortgage. The recorder shall make no charge for the services provided by this section to be performed by him.

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§ 4141.09 Unemployment compensation fund

(A) There is hereby created an unemployment compensation fund to be administered by the state without liability on the part of the state beyond the amounts paid into the fund and earned by the fund. The employment compensation fund shall consist of all contributions, payments in lieu of contributions described in sections 4141.241 [4141.24.1] and 4141.242 [4141.24.2] of the Revised Code, reimbursements of the federal share of extended benefits described in section 4141.301 [4141.30.1] of the Revised Code, collected under sections 4141.01 to 4141.46 of the Revised Code, together with all interest earned upon any moneys in the fund, any property or securities acquired through the use of moneys belonging to the fund, and all earnings of such property or securities. The unemployment compensation fund shall be used to pay benefits and refunds as provided by such sections and for no other purpose.

(B) The treasurer of state shall be the custodian of the unemployment compensation fund and shall administer such fund in accordance with the directions of the administrator of the bureau of employment services. All disbursements therefrom shall be paid by the treasurer of

state on warrants drawn by the administrator. Such warrants may bear the facsimile signature of the administrator printed thereon and that of a deputy or other employee of the administrator charged with the duty of keeping the account of the unemployment compensation fund and with the preparation of warrants for the payment of benefits to the persons entitled thereto. Moneys in the clearing and benefit accounts shall not be commingled with other state funds, but shall be maintained in separate accounts on the books of the depositary bank. Such money shall be secured by the depositary bank to the same extent and in the same manner as required by sections 135.01 to 135.21 of the Revised Code, and collateral pledged for this purpose shall be kept separate and distinct from any collateral pledged to secure other funds of this state. All sums recovered for losses sustained by the unemployment compensation fund shall be deposited therein. The treasurer of state shall be liable on his official bond for the faithful performance of his duties in connection with the unemployment compensation fund, such liability to exist in addition to any liability upon any separate bond.

(C) The treasurer of state shall maintain within the employment compensation fund three separate accounts which shall be a clearing account, an unemployment trust fund account, and a benefit account. All moneys payable to the unemployment compensation fund, upon receipt thereof by the administrator, shall be forwarded to the treasurer of state, who shall immediately deposit them in the clearing account. Refunds on contributions, or payments in lieu of contributions, payable pursuant to division (e) of this section may be paid from the clearing

account upon warrants signed by a deputy or other employee of the administrator charged with the duty of keeping the record of the clearing account and with the preparation of warrants for the payment of refunds to persons entitled thereto. After clearance thereof, all moneys in the clearing account shall be immediately deposited with the secretary of the treasury of the United States to the credit of the account of this state in the unemployment trust fund established and maintained pursuant to section 904 of the "Social Security Act," any law in this state relating to the deposit, administration, release, or disbursement of moneys in the possession or custody of this state to the contrary notwithstanding. The benefit account shall consist of all moneys requisitioned from this state's account in the unemployment trust fund. Moneys so requisitioned shall be used solely for the payment of benefits and for no other purpose. Moneys in the clearing and benefit accounts may be deposited by the treasurer of state, under the direction of the administrator, in any bank or public depositary in which general funds of the state may be deposited, but no public deposit insurance charge or premium shall be paid out of the fund.

(D) Moneys shall be requisitioned from this state's account in the unemployment trust fund solely for the payment of benefits and in accordance with regulations prescribed by the administrator. The administrator shall requisition from the unemployment trust fund such amounts, not exceeding the amount standing to this state's account therein, as are deemed necessary for the payment of benefits for a reasonable future period. Upon receipt thereof, the treasurer of state shall deposit such

moneys in the benefit account. Expenditures of such money in the benefit account and refunds from the clearing account shall not require specific appropriations or other formal release by state officers of money in their custody. Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for and may be utilized for the payment of benefits during succeeding periods, or, in the discretion of the administrator, shall be redeposited with the secretary of the treasury of the United States to the credit of this state's account in the unemployment trust fund, as provided in division (C) of this section.

(E) No claim for an adjustment or a refund on contribution, payment in lieu of contributions, interest, or forfeiture alleged to have been erroneously or illegally assessed or collected, or alleged to have been collected without authority, and no claim for an adjustment or a refund of any sum alleged to have been excessive or in any manner wrongfully collected shall be allowed unless an application, in writing therefor is made within four years from the date on which such payment was made. If the administrator determine that such contribution, payment in lieu of contributions, interest, or forfeiture, or any portion thereof, was erroneously collected, the administrator shall allow such employer to make an adjustment thereof without interest in connection with subsequent contribution payments, or payments in lieu of contributions, by him, or the administrator may refund said amount, without interest, from the clearing account

of the unemployment compensation fund, except as provided in division (B) of section 4141.11 of the Revised Code. For like cause and within the same period, adjustment or refund may be so made on the administrator's own initiative. An overpayment of contributions, payment in lieu of contributions, interest, or forfeiture for which an employer has not made application for refund prior to the date of sale of his business shall accrue to his successor in interest.

An application for an adjustment or a refund, or any portion thereof, that is rejected is binding upon the employer unless, within thirty days after the mailing of a written notice of rejection to the employer's last known address, or, in the absence of mailing of such notice, within thirty days after the delivery of such notice, the employer files an application for a review and redetermination setting forth his reasons therefor. The administrator shall promptly examine the application for review and redetermination, and if a review is granted, the employee shall be promptly notified thereof, and shall be granted an opportunity for a prompt bearing.

(F) If the administrator finds that contributions have been paid to the bureau of employment services in error, and that such contributions should have been paid to a department of another state or of the United States charged with the administration of an unemployment compensation law, the administrator may upon request by such department or upon his own initiative transfer to such department the amount of such contributions less any benefits paid to claimants whose wages were the basis for such contributions. The administrator may

request and receive from such department any contributions or adjusted contributions paid in error to such department which should have been paid to the bureau.

(G) In accordance with section 303(c)(3) of the Social Security Act, and action 3304(a)(17) of the Internal Revenue Code of 1954 for continuing certification of Ohio unemployment compensation laws for administrative grants and for tax credits, any interest required to be paid on advances under Title XII of the Social Security Act shall be paid in a timely manner and shall not be paid directly or indirectly, by an equivalent reduction in the Ohio unemployment taxes or otherwise, by the state from amounts in the unemployment compensation fund.